Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1513

JOSEPH WILLIAMS, a/k/a HENRY WILLIAMS, a/k/a BUZZ WILLIAMS,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

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504-827-1976

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No.

JOSEPH WILLIAMS, a/k/a HENRY WILLIAMS, a/k/a BUZZ WILLIAMS,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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TO THE HONORABLE CHIEF JUSTICE WARREN BURGER, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Joseph Williams, a/k/a, Henry Williams, a/k/a Buzz Williams, hereinafter sometimes referred to as "Defendant" or "Appellant" respectfully petitions this Honorable Court for a writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit to review and reverse a judgment of conviction and a sentence for a violation of 21 U.S.C. 846, 21 U.S.C. 841(a)(1) and 18 U.S.C.2.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated April 23, 1975, is unpublished and appears herein at appendix A. The District Court wrote no opinion.

JURISDICTION

Jurisdiction is conferred on this Court by Section 1254 (1) of Title 28, U.S.C.

The judgment of the Court of Appeals for the Fifth Circuit was rendered on April 23, 1975. It is noted the thirty (30) days time period under Rule 22 has expired, however, Heflin versus United States, 358 U.S. 415 is cited for authorities for filing after May 23, 1975.

STATEMENT OF THE CASE

A. Summary Of The Indictment.

The Grand Jury in a five count indictment, charged the Defendant with conspiracy to possess with the intent to distribute and to distribute heroin and four counts of distribution of heroin.

The Defendant is charged in Counts, II, III, and IV of the indictment under 18 U.S.C. Sec. 2 as a "Principal".

B. Summary Of The Proceeding.

On May 28, 1974, a Grand Jury sitting in the United States District Court for the Eastern District of

Louisiana, returned the indictment summarized hereinabove against the Defendant. On June 30, 1974 the Defendant was arraigned and plead not guilty on all five counts of the indictment.

On July 5, 1974 an application for a bill of particulars, a motion for discovery and inspection, motion for production of exculpatory evidence, motion to disclose informer, motion to interview witnesses of fact, motion for severance and separate trial and motion for independent examination of evidence were filed on behalf of the Defendant. These motions were set for hearing on July 10, 1974 and were disposed of by agreement reached in pre-trial conference between Government and Defense Attorneys on July 9, 1974 all except three of the motions. The motion for severance and separate trial, motion for independant examination of evidence, and motion to disclose informer were heard on July 12, 1974 and were all denied by the Trial Court. The Defense filed a motion for an extension of time on July 8, 1974, which was also denied.

This case was brought on trial July 15, 1974. This trial proceeded in a normal fashion, and after the selection of the jury, opening statements were made by both the Government and the Defense, then the parties commenced to examine witnesses.

When the Government chief witnesses, Peter Menkiewicz and Raymond Martin, testified for counts II, III and IV of the indictment, the material participation of certain informer or cooperating individual (C.I.) was disclosed. Motion for Mistrial was timely made by Defendant for the Government's failure to

produce and/or disclose informer prior to trial. The motion was denied.

After the Government rested on the case in-chief, the Defense called Officer James Cambra of the New Orleans Police Department to offer testimony of prior inconsistent statements made by Government's Chief witness, Lenard Martin, for count V of the indictment. The Trial Court refused to allow Officer Cambra to testify before the jury. However, the testimony was preserved for appellant review.

Agent Henry Day Braud was called as a rebuttal witness by the Government. Agent Braud made reference to mug shots and rap sheets twice. Timely objections, and Motion for Mistrial were made by the Defense. The Trial Court denied the Motion and offered instruction which the defense refused.

In charging the jury the Trial Court gave insufficient instructions on addict-informer and accomplices, and no instruction was given on the Defense Theory of the Case. The Defense filed timely jury instructions on these points, but, they were all denied by the Court. The Court did not instruct the jury on the Defendant not taking the stand and no instruction was filed by the Defense on this point.

The jury retired to deliberate July 17, 1974 in the evening hours, and stayed until 12:30 a.m. July 18, 1974 and informed the Court that they would like to return 10:00 a.m. July 18, 1974. They returned with a verdict at 10:00 a.m. on July 18, 1974. The Jury found the Defendant guilty on counts I, II, III, and V of the indictment. The jury was unable to reach a verdict on count IV.

Motions for Direct Verdict of Aquittal was made for insufficient evidence and motions for mistrial based on material participation by informer was reurged. When the Government rested on case in-chief all motions was denied. After the Governments rest on rebuttal, again motion for mistrial based on testimony about mug shots and rap sheets by Agent Braud, was made and Court denied said motion.

Post trial motions were timely made by Defense and denied by the Court. The sentence on August 7, 1974 to Defendant was ten (10) years on each count I, II, III, and V. The sentence was to run consecutively making a total of forty (40) years.

On April 23, 1975, the United States Court of Appeal for the Fifth Circuit, No. 74-3207, Summary Calendar, affirmed the conviction. Judges Gewin, Goldberg and Dyer comprised the panel.

THE ISSUES PRESENTED

1. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN THE TESTIMONY REVEALED PARTICIPATION BY AN INFORMER AND THE COURT DENIED DEFENDANT'S MOTION FOR MISTRIAL, BASED ON MATERIAL PARTICIPATION BY INFORMER?

2. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED DEFENDANT'S MOTION FOR MISTRIAL, WHEN GOVERNMENT'S WITNESS MADE REFERENCE TO MUG SHOTS AND RAP SHEETS?

3. WHETHER TRIAL COURT ERRED IN DENYING DEFENSE THE OPPORTUNITY TO OFFER PROOF OF PRIOR INCONSISTENT STATEMENTS OR ACTS BY THE GOVERNMENT'S KEY WITNESS, LENARD MARTIN, IN COUNT V OF THE INDICTMENT?

4. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO INSTRUCT THE JURY ON THE DEFENSE THEORY OF THE CASE?

ARGUMENT

I

Reversible Error Occurred When The Trial Court Denied Defendant's Motion For Mistrial, Based On Material Participation By An Informer, When The Government Failed To Produce And/Or Disclose The Identity Of The Informer

When Officer Peter Menkiewicz testified on direct examination about Count II of the indictment, the alleged distribution of heroin on July 23, 1973, Officer Menkiewicz indicated that cooperating individual (C.I.) met at DEA officer was present when they arrived at 6100 Dauphine. The purpose of the C.I. was to introduce Office Menkiewicz to Daniel Mayoral the co-defendant herein.

On cross-examination Officer Menkiewicz admits that he could not purchase from someone he did not

know, therefore the C.I. was necessary for the introduction. Appendix pages 352-3 (Tr. 285-86).

Later on cross-examination Officer Menkiewicz disclosed that the C.I. was present throughout the transaction and that the C.I. actually participated in the sale and physically handled the evidence. Appendix pages 357-8 (Tr. 296-91).

When Officer Raymond Martin testified about Count IV of the indictment, the alleged sale of August 18, 1974, he indicated that the C.I. was present throughout the transaction. Further, the C.I. tendered money and received the evidence. Appendix pages 397-398 (Tr. 330-31).

It is recognized that the Government has a right to non-disclosure of an informer as C.I. under certain circumstances. However, under the facts of this case and the extent of participation by the informer or C.I. the Government is required to disclose and/or produce informer or C.I. prior to trial.

The informer was requested in an application for bill of particulars Appendix page 7 and motion to disclose informer Appendix pages 24 and 25. These requests should have been granted prior to trial.

The United States Supreme Court in *Raviaio v. United States*, 353 U.S. 53 at 61, 77 S.Ct. 623, describes when and under what circumstances an informer should be disclosed.

"Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action, at 61."

The materiality of John Doe's possible testimony must be determined by reference to the offense charged in Count 2 and the evidence relating to that count. The charge is in the language of the statute. It does not charge mere possession; it charges that petitioner did fraudulently and knowingly receive, conceal, but and facilitate the transportation and concealment after importation of . . . heroin, knowing the same to be imported into the United States contrary to law . . . While John Doe is not expressly mentioned, this charge, when viewed in connection with the evidence introduced at the trial, is so closely related to John Doe as to make his identity and testimony highly material."

Headnote 11 — Criminal Law Section 61

"It is error for the trial court to deny, prior to trial, an accused's bill of particulars requesting an informer's identity and address, where the indictment charged the accused with a sale of heroin to John Doe and it was thus evident from the face of the indictment that the informer was a participant in and a material

witness to that sale; the Government should have been required to supply that information or suffer dismissal.

II

The Trial Court Committed Reversible Error When It Denied Defendant's Motion For Mistrial When The Government Witness, Agent Henry Day Braud, Made Reference To The Defendant's "Mug Shots And Rap Sheets"

The reference Agent Braud made to Defendant's mug shots and rap sheets was unresponsive. Appendix page 620 (Tr. 553)

Q What happened after you saw he and Daniel Mayoral?

A As I stopped and lit my cigarette and I glanced over in his direction the white Defendant, it was like they was engaged in conversation, and I returned back to my vehicle and then notified that — who he was talking with because I only know the defendant from prior investigations and rap sheets and mug shots.

MR. HARRIS: Your Honor, if it please the Court, may we approach the bench.

THE COURT: All right.

The second reference made to "rap sheets and so on and so forth" by Agent Braud was in response to the Assistant United States Attorney's questions. Appendix pages 620-1 (Tr. pages 553-54)

BY MR. HABANS:

Q Without going into detail, you have reviewed photographs of the Defendant previously?

A Yes, I've seen photographs of the Defendant.

Q Did you rely on these photographs to identify him as being the same person?

A That's correct.

Q Had you seen this Defendant on other occasions other than today?

A Other than —

Q The 23rd and today?

A No, other than — I had seen him on previous investigations, but, like I say, rap sheets and so on and so forth.

The Defendant did not take the witness stand and the Government did not advance any sound theory to admit the obvious prejudicial reference to Defendant prior arrests record. Considering the nature of the case and the indictment, statements about the prior criminal record is extremely prejudicial and an attack on the Defendant's character when his character is not properly at issue.

Jones on Evidence, Sec. 418 pages 417-18

> "Peculiarly applicable to criminal cases is the rule which prohibits the introduction of evidence of other wholly independent offenses as the basis for an inference that the defendant is guilty of the offense for which he is being tried. Otherwise stated, it is not proper to show by proof of previous bad conduct that he has a

propensity for committing crime, and because he committed other crimes on previous occasions he probably committed the crime in question.

"Mug shots," "rogues gallery" photographs, and photographs taken in prison, of the defendant which suggest or reveal that the defendant has a criminal record of prior offenses, are equally inadmissible, at least prior to their becoming relevant for impeachment purposes after the defendant has taken the witness stand. But if such a photograph has other relevancy, such as its importance in identifying the defendant, it may be admissible despite its prejudicial effect arising from the disclosure that the defendant had previously been in trouble with the law.

> Although it has been treated as a rule of relevancy, and is here so classified, the rule is recognized, not because the evidence of previous offenses is irrelevant, but for other more plausible reasons. One basic reason for the rule is that such evidence is apt to be given too much weight, rather than too little, by the jury, thus resulting in the conviction of the defendant because he is a bad man and not because of his specific guilt of the offense with which he is charged."

In *Odom v. United States*, 377 F.2d 853, (5th Cir., 1967) 859-60 this Court describes a situation which resembles the case before the Bar. The testimony un-

der attack occurred when Sergeant Johnson, one of the arresting officers, was on the stand and was asked how long he had known Odom, to which he replied:

> "I had seen Mr. Odom come in and out of jail and spoke with him for approximately a year and a half."

Counsel moved promptly to strike the above quoted testimony and the motion was granted, with the following admonition from the Court:

> "THE COURT:
> "The statement about seeing him come in and out of jail is not responsive and it's stricken. Don't consider that in arriving at your verdict."

The judge's words were here at most a mild antiseptic with no prognostic or retrospective assurance that they eliminated the sepsis.

[W]here, as here, the improper evidence was calculated to make such an impression on the jury that no direction from the Court, however strong, can eliminate the prejudice thereby created, the trial court must declare a mistrial." id. at 340-41.

Judge Kalodner, in *United States v. Clarke*, 3 Cir. 1965, 343 F.2d 90, 92, a similar factual setting to the Helton case, gave a classic reaction. He said that the trial judge's view that his prompt admonition to the jury to disregard the properly stricken testimony removed any possible prejudice in the jury's mind brought to mind the immortal lines:

> "The Moving Finger writes; and, having writ,
> Moves on: nor all your Piety nor Wit,
> Shall lure it back to cancel half a Line,
> Nor all your Tears wash out a Word of it.'
> Rubaiyat, Stanza 71.

Reversed and Remanded.

We reverse and order a new trial, sustaining the fourth contention. In *Michelson v. United States*, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948), the Court said,

> "The state may not show the defendant's prior trouble with the law, (or) specific criminal acts * * * even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; * * * (but) that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice. 335 U.S. at 475, 69 S.Ct. at 218.

See also *United States v. Fisher*, 377 F.2d 285 (6th Cir. 1967); *Barnes v. United States*, 124 U.S. App. D.C. 318, 365 F.2d 509 (1966); *Lydia v. United States*, 321 F.2d 788 (9th Cir. 1963).

III

The Trial Court Erred In Denying Defense An Opportunity To Offer Proof Of Inconsistent Statement Or Acts Which Contradict Lenard Martin's Testimony

During the trial of this matter the Government's chief witness, on Count V of the indictment Lenard

Martin, testified that he had not been using or possessed narcotics since 1971, Appendix page 235 (Tr. 168).

Defense counsel in order to impeach the witness attempted to introduce evidence showing that the witness had been arrested and found in possession of narcotics administering paraphernalia in 1973. The Court would not allow defense counsel the opportunity to present such evidence even though the testimony of the witness indicated that he was the only eyewitness participant in an alleged purchase of drugs from the defendant. See Appendix pages 277-278 (Tr. 210-211).

Officer James Cambra would testify that Lenard Martin was arrested for possession of heroin and he was arrested in possession of narcotic paraphernalia (hypodermic syringe) in a high narcotic area and that Crime Laboratory Report was negative for the presence of heroin, all as stated in his police report. Appendix 505-6, (Tr. 438-39).

> MR. HARRIS: With that, Your Honor, we are going to offer, introduce and offer into evidence, without getting into the details of what the report says, we are going to offer the report into evidence not as a jury exhibit but as an offer of proof, Your Honor, and to preserve the record on our objection of not getting this evidence before the jury.

It is clearly shown in the transcript from circumstances that Lenard Martin has intended possession of narcotics even though hypodermic syringe

was negative heroin. These acts are inconsistent with and contradicts Lenard Martin prior testimony. Therefore, this evidence should have been admitted for said purpose.

Jones on Evidence, Sec. 26.2 pages 172-4,

A familiar mode of impeaching a witness is by presenting proof showing that he has made statements or done acts which are inconsistent with or contradictory of his testimony. *Jones on Evidence*, Sec. 26:2 page 172.

> "A witness may thus be impeached by proof of statements which were made at a former trial, and contradictory statements are admissible although made after the occurrence which is the subject matter of the suit.

While a statement of a witness, in order to be admissible in evidence for the purpose of impeachment, must be inconsistent with or contradictory of the witness's testimony, it is not necessary that direct contradiction be made to appear. If there is inconsistency or conflict between the statements in any material respect, it is for the jury to determine the effect of such inconsistency upon the credit of the witness.

While the general rule has been, and still is, that evidence of prior inconsistent statements by a witness are admissible only for the purpose of impeachment and not as substantive

evidence of the facts recited in the prior statements, there is substantial recent authority to the contrary. By the adoption of the Federal Rules of Evidence, in excluding prior inconsistent statements from the definition of hearsay, such statements, which are inconsistent with the testimony of the witness, became expressly admissible as substantive evidence, and not merely for the purpose of discrediting the witness."

IV

The Trial Court Committed Reversible Error When It Failed To Instruct The Jury On The Defense Theory Of The Case.

The defense theory was a plausible one in the circumstances, and had the jury accepted it, which it could have properly done, the Government's case would necessarily have failed, and this is the absence of concrete evidence and testimony by the addict-informer justified the defense's request of the aforementioned charge. It is recognized that a party in a criminal case, is entitled to a specific instruction on his theory of the case if there is evidence to support it and a proper request for such an instruction is made.

The Defendants' Theory of the case was contained in Defense Jury Charges # VIII and IX:

JURY CHARGE #VIII

In considering the evidence presented on Count I, II, III and IV of the indictment, the testimony of Daniel H.

Mayoral and Robin Mayoral must be considered as testimony from accomplices. Therefore, I charge you as a matter of law that accomplices that are tainted with confessed criminality are often influenced by their testimony by a strong motive of hope of favor or of pardon, and, therefore, it is incumbent upon the jury to look carefully into the secret motive that might actuate bad minds to draw in and victimize the innocent. *United States v. Murray*, 445 F.2d 1171, 1176 (3rd Cir. 1971).

The testimony of an accomplice is inherently suspect because such a witness may well have an important personal stake in the outcome of the trial. He may believe that by testifying he may receive certain regards and he may either explicitly or implicitly have been promised some consideration in return for his testimony. *United States v. Padgent*, 432 F.2d 701, 704 (2nd Cir. 1970).

JURY CHARGE #IX

Further, when you, Ladies and Gentlemen of the Jury, deliberate on evidence presented in Count V of the indictment you must consider the testimony of Lenard Martin as that of an addict-informer.

I charge you that [A]n addict-informer faces the immediate threat of being jailed and thereby kept from access to the drugs to which he is addicted, as well as the prospect of a long term prison sentence and possible rehabilitation from various persons in the drug trade. These factors substantially increase the danger that the addict-informer may color his testimony so as

to place guilt on the defendant. *Government of Virgin Islands v. Hendricks*, 476 F.2d 776, 779-780 (3rd Cir. 1973) p. 779-780.

In the case of *Perez v. United States*, 297 F.2d 12 (1961) at 16, (5th Cir. 1961).

> "It is elementary law that the defendant in a criminal case is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence. *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951). A charge is erroneous which ignores a claimed defense with such a foundation. *Hyde v. United States*, 15 F.2d 816 (4th Cir. 1926). The charge to which he is entitled, upon proper request, in such circumstances is one which precisely and specifically, rather than merely generally or abstractly, points to his theory of defense. Cf. *United States v. Indiana Trailer Corp.*, 226 F.2d 595, 598 (7th Cir. 1955); *Apel v. United States*, 247 F.2d 277 (8th Cir. 1951), and one which does not unduly emphasize the theory of the prosecution, thereby deemphasizing" proportionally the defendant's theory. It is also fundamental to our jurisprudence that instructions to the jury must be consistent with each other, and not misleading to the jurors. *Smith v. United States*, 230 F.2d 935 (6th Cir. 1956). The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it. Smith v. United States, supra. Most important, is no condition of proof is it permissible to leave with the jury the idea that it has become the duty of the defendant to establish his innocence to obtain an acquittal. See, e.g. Ezzard v. United States, 7 F.2d 808 (8th Cir. 1925) The refusal of the trial judge to instruct the jury as requested was in violation of each of these principles.

The case of *Strauss v. United States*, 376 F.2d 416, at 419, (5th Cir. 1967), reiterated the doctrine that the defendant in a criminal case is entitled to have presented instructions relating to any foundation in the evidence regardless as to how tenuous:

> "We find no requirement that a requested charge encompass, in the trial judge's eyes, a believable or sensible defense, the judge is the law-giver. He decides whether the facts constituting the defense framed by the proposed charge, if believed by the jury, are legally sufficient to render the accused innocent. The jury is a fact-finder. If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration. In effect, the trial judge directs a verdict on that issue against the defendant. This is impermissible. Bryan v. United States, 5 Circuit, 1967, 373 F.2d 403. The judge must, therefore, be cautious and unparsimonious in presenting to the jury all of the possible defense which the jury may choose to

believe. We hold that where the defendant's proposed charge presents, when properly framed, a valid defense, and where there has been some evidence relevant to that defense adduced at trial, then the trial judge may not refuse to charge on that defense. In Tatum v. United States, 1950, 88 U.S. App. D.C. 386, 190 F.2d 612, 617 the D.C. Circuit said:

"We do not intend to characterize the case for the defense as either strong or weak. That is unnecessary, for 'in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions even though the sole testimony in support of the defense in his own."

Levine v. United States, 1968, 104 U.S. App. D.C. 281, 261 F.2d 747; *Perez v. United States, supra*, *Smith v. United States*, 6 Cir. 1956, 230 F.2d 935; *United States v. Indian Trailer Corp.*, 7 Cir. 1955, 226 F.2d 595. See *Merrill v. United States*, 5 Cir. 1964, 338 F.2d 763; *Koontz v. United States*, 5 Cir. 1960, 277 F.2d 53.

All evidence of which varied conclusion can be reached must be considered as establishing a possible defense and the defendant is entitled to such charge. The case of *United States v. Grimes*, 413 F.2d 1376, at 1778 (7th Circuit 1969) states:

"We start with the proposition that the defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence, however, tenuous. *Tatum v. United States*, 88 U.S. App. D.C. 386, 190 F.2d 612, 617 (D.C. Cir. 1951); *United States v. Phillips*, 217 F.2d 435, 442-443 (7th Cir. 1954). There is no question that the evidence in the present case raised a jury question as to the cause of the fight between Reid and the guards and Grimes' motivation in intervening in the struggle. The issue then becomes whether federal law provides a defense to a prosecution under Section 111 for the use of reasonable force to defend another from an unprovoked assault by a federal officer."

Once this reason theory has been established either by direct evidence of the defense or through the insufficiency of the evidence produced by the State. It is mandatory in equity and justice that the defense charge be given. All are presume to be innocent until proven guilty and the determination of guilt is strictly a jury function.

CONCLUSION

For the foregoing reasons, we pray for certiorari, reversal and dismissal and such other and further relief in the premises as this Honorable Court may deem just and equitable.

Respectfully submitted,

ARTHUR L. HARRIS, SR.
Attorney for Petitioner
2614 Tulane Avenue Suite 202
New Orleans, Louisiana 70119
504-827-1976

CERTIFICATE

I hereby certify that a copy of this petition has been mailed, postage prepaid, by U.S. Mail, to the Solicitor General of the United States, Department of Justice, Washington, D.C., and that a copy has been mailed, postage prepaid, by U.S. Mail, to the United States Attorney for the Eastern District of Louisiana, 500 St. Louis Street, New Orleans, Louisiana, this ____ day of May, 1975.

ARTHUR L. HARRIS, SR.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3207
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
versus

JOSEPH WILLIAMS, a/k/a Henry Williams,
a/k/a Buzz Williams,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

(April 23, 1975)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.*

* Rule 18, 5 Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

Supreme Court, U. S.
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No. 74-1513

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1513

JOSEPH WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (1) that a government informant should have been produced or identified prior to trial; (2) that a government witness improperly alluded to petitioner's prior police record; (3) that the district court should have allowed petitioner to introduce evidence to impeach an informant; and (4) that the court's instructions to the jury relating to the testimony of accomplices and informants was insufficient.

Following a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner was convicted on one count of conspiracy to distribute heroin, in violation of 21 U.S.C. 846, and on three counts of distributing heroin, in violation of 18 U.S.C. 841(a)(1). He was sentenced to ten years' imprisonment on each count, the sentences to run consecutively, and to a special parole term of three years. The court of appeals affirmed without opinion (Pet. App.).

On January 17, 1973, Leonard Martin, a former heroin addict who was acting as a government informant, and Agent Earlie Hughes, working under the auspices of the Drug Enforcement Administration, Department of Justice ("DEA"), were on patrol in an unmarked car. When they saw petitioner they stopped, and Martin got out and asked petitioner if he knew where Martin could obtain heroin. Petitioner responded affirmatively and asked how much money Martin wished to spend (Tr. 171-173). Martin replied that he had $700. Petitioner told Martin to get the money and call him at a private number listed in his wife's name (Tr. 90-91, 174, 232). When Martin called petitioner a meeting was arranged for later in the day at a bar owned by petitioner (Tr. 179-180). Petitioner also discussed the quantity of heroin to be involved in the transaction (Tr. 180).

Martin and Agent Hughes thereafter drove to the bar and waited in the car for petitioner. When petitioner arrived he and Martin went into an alley adjacent to the bar where petitioner explained that he did not want to effect the transaction in front of Hughes. Martin then returned to Agent Hughes, obtained $350 from him, and gave it to petitioner (Tr. 193-194, 241-242).

Petitioner and Martin drove away from the bar with Agent Hughes following at a distance, as had been agreed. Petitioner then drove to a garage where a package of heroin had been concealed, retrieved it, and gave it to Martin, who in turn subsequently gave it to Agent Hughes (Tr. 196-198, 244).

During the summer of 1973, undercover narcotics agents arranged to make a series of heroin purchases from Daniel Mayoral.[1] Petitioner, in turn, supplied Mayoral with the heroin.

On July 23, 1973, Officer Peter Menkiewicz, working under the auspices of the DEA, arranged to purchase heroin from Mayoral (Tr. 255-256). Accompanied by the informant James Pickring, who introduced him to Mayoral, he went to Mayoral's house on the same day (Tr. 257). Mayoral told him that he did not have any heroin and that they would have to wait for him to contact his supplier (Tr. 263). Mayoral then telephoned petitioner and arranged to obtain heroin (Tr. 263, 268, 364). He then told his wife to make out a check for $100 payable to petitioner, and also asked Menkiewicz for $200 (Tr. 268-270).

Mayoral left and drove to petitioner's house (Tr. 306). **There he gave the money to petitioner, who told him that he could pick up the heroin at petitioner's bar,** which **Mayoral did (Tr. 306-308, 365). Mayoral then returned to his own house and completed the transaction with Officer** Menkiewicz (Tr. 273).

On August 10, 1973, Officer Menkiewicz and Mayoral arranged another heroin purchase (Tr. 278-279). Mayoral had already obtained the heroin from petitioner by the time Menkiewicz arrived at his house to conclude the sale (Tr. 279-280, 366). In the middle of the transaction they were interrupted by petitioner's arrival (Tr. 280-281). Mayoral assured Menkiewicz that petitioner was "okay," and the transaction was completed in petitioner's presence (Tr. 281-282).[2]

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[1]Mayoral was indicted as a co-defendant with petitioner. He pleaded guilty before trial to conspiracy to possess heroin with intent to distribute it, and to distribute heroin, and testified as a government witness at trial.

[2]The government also alleged (Count IV) that another sale in which petitioner was the ultimate supplier occurred on August 18, 1973, this one between Mayoral and another agent (Tr. 328-331). The jury was unable to reach a verdict on this count.

1. Petitioner contends (Pet. 6-9) that the district court should have ordered the government to identify and produce the informant, James Pickring, who arranged the July 23, 1973, meeting between Mayoral and Officer Menkiewicz. The identity of the informant was disclosed, however, in material the government turned over to petitioner at the outset of trial (Tr. 429-434), and the government's failure to produce the informant was not error.

Officer Menkiewicz and Mayoral testified to the transaction between them, and Mayoral said that he obtained the heroin from petitioner after telephoning him in Menkiewicz's presence. Other government agents who saw Mayoral meet with petitioner when he went to obtain the heroin corroborated Mayoral's testimony. Evidence of petitioner's involvement in the transaction was thus amply provided without need of the informant's testimony, and the government had no duty to produce the informant simply because he witnessed that part of the transaction which occurred between Officer Menkiewicz and Mayoral. See *United States* v. *Tatum*, 496 F.2d 1282 (C.A. 5).

Petitioner does not claim that the informant possessed information which would have exculpated him. Moreover, petitioner was not present when the informant introduced Officer Menkiewicz to Mayoral, or when Mayoral sold the officer the heroin. The informant was not present when Mayoral got the heroin from petitioner. Accordingly, there was no direct contact between petitioner and the informant. Petitioner makes no suggestion whatever as to what testimony the informant conceivably might have given which would have been relevant to his defense, and under these circumstances the government was not obliged to produce him. See *Roviaro* v. *United States*, 353 U.S. 53, 62; *United States* v. *Hodges*, 493 F.2d 11 (C.A. 5).[3]

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[3]Petitioner is in no better position if his argument is read to include the assertion that it was error for the district court to deny his motion for a bill of particulars identifying the government's informant (Pet. 7). Such a motion is committed to the sound discretion of the district court and will be reversed only on a showing of clear abuse. *Joseph* v. *United States*, 343 F.2d 755 (C.A. 5), certiorari denied, 382 U.S. 828. No such abuse can be shown here, since petitioner received before trial all the information about the government's case to which he was conceivably entitled and, moreover, makes no showing that he was surprised at trial by any evidence introduced by the government. See *Williams* v. *United States*, 289 F.2d 598, 601 (C.A. 9).

2. Petitioner claims (Pet. 9-13) that a government witnesses' reference to "mug shots" and "rap sheets" should have resulted in a mistrial.

The government called Agent Henry Braud as a rebuttal witness. He had seen Mayoral and petitioner meet at petitioner's residence on July 23. The following colloquy occurring during his direct testimony (Tr. 553-554):

> Q. What happened after you saw [petitioner] and Daniel Mayoral?
>
> A. As I stopped and lit my cigarette and I glanced over in his direction, the white Defendant [Mayoral], it was like they was engaged in a conversation, and I returned back to my vehicle and then notified that—who he was talking with because I only know [petitioner] from prior investigations and rap sheets and mug shots.
>
> * * * [Here there occurred a bench conference requested by defense counsel.]
>
> Q. Without going into detail, you have reviewed photographs of [petitioner] previously?
>
> A. Yes. I've seen photographs of [petitioner].
>
> Q. Did you rely on these photographs to identify him as being the same person?
>
> A. That's correct.
>
> Q. Had you seen [petitioner] on other occasions other than today?
>
> A. Other than—
>
> Q. The 23rd and today?
>
> A. No, other than—I had seen him on previous investigations, but, like I say, rap sheets and so on and so forth.

At the bench conference the government suggested that the witness' statement could be corrected by a curative instruction. Petitioner's counsel requested, however, that no such instruction be given, and instead after the closing arguments moved for a mistrial on the basis of the witness' testimony. The trial court again offered to give a curative instruction, but again the suggestion was rejected (Tr. 603-604).[4]

The district court is in the most favorable position for determining whether events occurring during the course of trial require the severe remedy of a mistrial, and its ruling on a motion for mistrial will be reversed only because of a clear abuse of discretion. See, *e.g.*, *United States* v. *Faulkenbery*, 472 F.2d 879, 882 (C.A. 9), certiorari denied, 411 U.S. 970. There was no such abuse of discretion here.

The obscure reference to petitioner's possible prior incarceration had not been anticipated by the prosecutor. Opportunity for curative instructions was twice presented and twice refused. Moreover, it has frequently been held that such comments as occurred here, "of a brief and passing nature, inadvertently made," constitute harmless error. *United States* v. *Gocke*, 507 F.2d 820, 822-823 (C.A. 8), certiorari denied, 420 U.S. 979 (reference to defendant's prior confinement in prison). See also *United States* v. *Carter*, 448 F.2d 1245 (C.A. 8), certiorari denied, 405 U.S. 929 (reference to a prison parole card bearing defendant's photograph); *United States* v. *Christian*, 427 F.2d 1299 (C.A. 8), certiorari denied, 400 U.S. 909 (reference to defendant's prior confinement in prison); *United States* v. *Dillinger*, 341 F.2d 696, 699 (C.A. 4) (same). Finally, the evidence of petitioner's guilt

[4]Defense counsel stated, upon making his motion, "We * * * waived the objection when it happened, we merely did not want to call attention to it, therefore, we are not going to ask for an instruction, but we are going to * * * move for a mistrial * * *" (Tr. 603-604). The district court said that it was "perfectly willing to give a corrective charge to the jury * * * but [that it would defer] to [counsel's] wishes not to give one" (Tr. 605).

was substantial. Under these circumstances, the district court did not abuse its discretion in concluding that the witnesses' remarks did not warrant a mistrial. See *Kotteakos* v. *United States*, 328 U.S. 750, 764-765.

3. Petitioner next contends (Pet. 13-16) that he should have been allowed to introduce evidence to show prior conduct inconsistent with the testimony of informant Leonard Martin. Such evidence is properly admitted, however, only when the prior conduct was in fact inconsistent, see, *e.g.*, *Grunewald* v. *United States*, 353 U.S. 391, 418, which was not the case here.

Martin testified that he was a former narcotics addict who was currently enrolled in a methadone treatment program, but that he had not used heroin since 1971 (Tr. 168, 204-205, 213). The evidence petitioner sought to introduce showed that Martin had been arrested in 1973 for possession of heroin. Out of the presence of the jury, James Cambra, the arresting officer, reconstructed the events surrounding Martin's arrest. On the evening of December 9, 1973, Martin and two other men were standing beside an automobile. One of the men (not Martin), on observing an approaching police car, threw a syringe into the automobile (Tr. 441). Cambra suspected that the syringe contained heroin and arrested all three men. A subsequent laboratory analysis of the contents of the syringe failed to reveal any evidence of narcotics (Tr. 442), however, and the charges of illegal possession of narcotics against the three men were dismissed (Tr. 442-443, 446).

Thus, evidence of Martin's arrest on a charge which proved to be unfounded did not amount to a *prima facie* showing of a "real inconsistency" (IIIA Wigmore, Evidence, §1040 (Chadbourn Rev.)) with his testimony that he had not used heroin since 1971, and, accordingly, the trial court properly refused to allow the introduction of the arrest into evidence.

4. Petitioner argues next (Pet. 16-21) that the trial court gave insufficient cautionary instructions regarding the weight to be accorded the testimony of accomplices and informants.

In pertinent part the court instructed (Tr. 609-610):

> An accomplice is one who unites with another person in the commission of a crime voluntarily and with common intent. An accomplice does not become incompetent as a witness because of the participation in the crime charged.
>
> On the contrary, the testimony of an accomplice alone, if believe[d] by the jury, may be of such weight to sustain a verdict of guilty even though not corroborated or supported by other evidence.
>
> However, the jury should keep in mind that such testimony is always to be received with caution and weighed with great care. You should never convict a Defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt.
>
> The testimony of an informer who provides evidence against a Defendant for pay or for immunity from punishment or for personal advantage or vindication must be considered and weighed by the jury with greater care than the testimony of the ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against the Defendant.
>
> You must also consider whether or not the informer was a drug addict at the time the alleged transaction took place or at the time of trial and whether or not this would have any effect upon his testimony.

This instruction properly apprised the jury of the limitations which attach to the testimony of accomplices and informants. Devitt and Blackmar, *Federal Jury Practice and Instructions*, §§12.02 and 12.04 (1970); *United States* v. *Reid*, 437 F.2d 94 (C.A. 10). Moreover, although there is no precise formulation for the instruction, the court alerted the jury to the additional care that may be required in evaluating the testimony of an informer who is also a narcotics addict. See, *Government of the Virgin Islands* v. *Hendricks*, 476 F.2d 776, 780 (C.A. 3). Although the court did not instruct the jury in the language requested by petitioner (Pet. 16-18), "[o]nce the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." *United States* v. *Bayer*, 331 U.S. 532, 536. See also, *United States* v. *Banks*, 485 F.2d 545, 549 (C.A. 5), certiorari denied, 416 U.S. 987.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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